

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ROBERT L. RICH</b>	)	
Claimant	)	
	)	
VS.	)	Docket No. <b>187,685</b>
	)	
<b>BEECH AIRCRAFT/RAYTHEON</b>	)	
Respondent	)	
Self-Insured	)	

**ORDER**

Respondent appealed Administrative Law Judge John D. Clark's Award dated October 25, 2000. The Board heard oral argument on April 13, 2001.

**APPEARANCES**

Claimant appeared by his attorney, David Farris of Wichita, Kansas. The self-insured respondent appeared by its attorney, David Wooding of Wichita, Kansas.

**RECORD & STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUE**

This is an appeal from a review and modification proceeding. On August 20, 1996, the parties entered into a Stipulated Award which provided that claimant had a 26 percent functional impairment and was entitled to a running award in the amount of \$38,050. At the hearing on review and modification, the parties further stipulated the claimant had a 100 percent permanent partial disability for which the statutory maximum amount of \$100,000 has now been paid.

The Administrative Law Judge's Award, dated October 25, 2000, determined the claimant is permanently and totally disabled.

The sole issue raised on review by the respondent is whether the claimant is permanently totally disabled. Respondent contends that the claimant is still capable of engaging in substantial gainful employment and has not met his burden of proof to establish that he is permanently totally disabled.

Conversely, the claimant contends that he is essentially and realistically unemployable and the Administrative Law Judge's decision should be affirmed.

### **FINDINGS OF FACT**

Having reviewed the evidentiary record filed herein, and the stipulations of the parties, the Board makes the following findings of fact and conclusions of law:

The claimant's formal education concluded in the 10th grade and he neither received a high school equivalency diploma nor any additional schooling or training. He was 59 years old at the time of the hearing and was ultimately employed for the respondent for 22 years. During claimant's employment with respondent he had worked as a bench machinist and, from 1993 until his termination, he had worked as a tool grinder.

The claimant testified that in June 1993 he began to experience problems with his shoulders, arms and hands going to sleep. The claimant began a series of surgeries to correct his symptoms on April 1, 1994. As noted in the Administrative Law Judge's Award, the surgeries included:

- Mass removal and anterior acromioplasty of the left shoulder performed by Dr. Artz on April 1, 1994.
- Right carpal tunnel release performed by Dr. Artz on May 18, 1994.
- Open anterior acromioplasty of the right shoulder with release of the coracoacromial ligament performed by Dr. Artz on July 15, 1994.
- Right shoulder opened, drained and a hematoma removed by Dr. Artz on August 19, 1994.
- Left carpal tunnel release performed by Dr. Artz on September 16, 1994.
- Anterior transposition of the right ulnar nerve at the elbow performed by Dr. Artz on January 18, 1995.
- Anterior C4-5 and C5-6 discectomy and fusion utilizing iliac crest bone graft and an anterior cervical locking plate and screw fixation performed by Dr. Trimble in February 1998.

The claimant's surgeries included both hands, both shoulders, his right elbow and his neck. The claimant testified that he continues to have constant neck pain radiating into both shoulders, a stiff neck, sore right shoulder, burning and stinging sensations in both shoulders and elbows along with wrist cramps and frequent migraine headaches.

The respondent placed the claimant on disability retirement and the claimant filed for and is receiving Social Security Disability Benefits. The claimant testified that he does not believe he is able to perform work in the open labor market.

Dr. Trimble first saw the claimant on January 19, 1998, performed a physical examination and diagnosed the claimant with cervical 4-5 and 5-6 right spondylitic radiculopathy. Dr. Trimble opined the claimant was in need of an anterior discectomy and fusion at the cervical 4-5 and 5-6 levels. Dr. Trimble performed this surgery on the claimant in February 1998.

Dr. Trimble testified that the claimant could not return to the work he was doing with the respondent nor was claimant able to return to any type of gainful employment because of his neck injury, limited range of motion and continued pain. He felt that the claimant was permanently and totally disabled.

Dr. Murati examined the claimant, at the request of claimant's attorney, on February 23, 2000. Dr. Murati's diagnosis was: (1) neck pain status post fusion; (2) bilateral hand pain status post CTR; (3) bilateral elbow pain status post UCR on the right; and, (4) bilateral shoulder pain status post surgery.

According to the *AMA Guides*, Fourth Edition, Dr. Murati gave the claimant a 10 percent whole person impairment due to the loss of range of motion to the cervical spine; for the neck surgery a 9 percent whole person impairment plus an additional 1 percent for the additional level; loss of range of motion to the right shoulder is 7 percent to the upper extremity; loss of range of motion to the left shoulder is 7 percent to the upper extremity; for the carpal tunnel syndrome in both hands a 10 percent to the upper extremity for each hand; and for the ulnar cubital syndrome a 10 percent to the upper extremity for each hand. The right upper extremity ratings combine for a total of 25 percent which converts to a 15 percent whole person impairment. The left upper extremity ratings combine for a total of 25 percent which converts to a 15 percent whole person impairment. Using the combined values chart, all of these combine for a 42 percent whole person impairment. Dr. Murati also concluded the claimant is permanently and totally disabled.

Dr. Brown examined the claimant on April 14, 2000, at respondent's request. Dr. Brown rated claimant with a 5 percent impairment of the right upper extremity and a 3 percent impairment of the left upper extremity as a result of loss of range of motion of his shoulders. The doctor noted claimant would be included in DRE Cervicothoracic Category III at 15 percent for a whole body impairment. The doctor opined claimant has bilaterally a 5 percent impairment of the upper extremity on the basis of carpal tunnel residuals and on the right a 5 percent impairment of the upper extremity on the basis of residuals of ulnar cubital syndrome. In addition, the claimant has a 5 percent impairment of each upper extremity on the basis of loss of grip strength. The doctor concluded the ratings convert and combine for a 30 percent permanent partial functional impairment to the body as a whole based on the residuals of the various overuse syndromes.

The doctor further opined the claimant was capable of performing light work with no use of the hands above shoulder level, no work requiring frequent rotation or hyperextension of the neck, no frequent reach away from the body more than 20 inches, no lift greater than 25 pounds occasionally, 15 pounds frequently between the waist and chest and no frequent flexion and extension of the wrists more than 30 degrees.

Mr. Jerry Hardin testified as a vocational expert on claimant's behalf. Mr. Hardin first saw claimant on October 30, 1995, and subsequently had a telephone conversation with claimant on June 13, 2000. Mr. Hardin testified that based on the restrictions imposed by Drs. Trimble and Murati he felt the claimant was unable to perform or obtain substantial, gainful employment and was permanently and totally disabled. However, utilizing Dr. Brown's restrictions, Mr. Hardin testified that the claimant would be able to do some jobs.

Conversely, respondent's vocational expert, Ms. Karen Crist Terrill, did not find claimant to be unemployable. Ms. Terrill's report was based upon Dr. Brown's medical records, claimant's personnel records and some of claimant's educational background information. Although she did not meet with the claimant, she identified several sedentary jobs which she considered to be within Dr. Brown's restrictions. Her list included a telemarketing clerk, cashier or customer service type positions and some very light production type assembly positions.

#### **CONCLUSIONS OF LAW**

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>1</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>2</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.<sup>3</sup>

K.S.A. 44-510c(a)(2) (Furse 1993) defines permanent total disability as follows:

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<sup>1</sup>K.S.A. 44-501(a) (Furse 1993).

<sup>2</sup>K.S.A. 44-508(g) (Furse 1993).

<sup>3</sup>*Tovar v. IBP, Inc.*, 15 Kan. App.2d 782, 817 P.2d 212 (1991).

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2) (Furse 1993), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.<sup>4</sup>

In *Wardlow v. ANR Freight Systems, Inc.*, 19 Kan. App.2d 110, 113 (1993), the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

Initially, the respondent contends that Dr. Trimble did not conclude that the claimant was permanently totally disabled. As noted by the Administrative Law Judge, Dr. Trimble vacillated depending upon which attorney was posing the questions but the doctor ultimately concluded the claimant was permanently and totally disabled from engaging in substantial gainful employment. Dr. Trimble was consistent in his opinion that although the claimant could perhaps work 2-3 hours a day he was incapable of performing a full-time 40-hour work week. On cross-examination the doctor testified:

Q. So your opinion on the permanent total disability issue is based on a component which takes into consideration the financial livelihood of the claimant?

A. That, as well as the fact that I think he could only work potentially very limited numbers of hours. And I realize that it's not my job to determine what

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<sup>4</sup>*Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

his take-home income is, but I do not feel that he could work more than a couple of hours, two to three hours a day.”<sup>5</sup>

Respondent next contends that the fact the claimant went to Europe for a week is indicative that his condition is not as severe as represented. Dr. Trimble commented that Dr. Jahnke’s office notes indicated that claimant did well while in Europe. However, the claimant testified that while in Europe he was, in fact, in pain but did not tell Dr. Jahnke because claimant did not want any more trigger point injections from Dr. Jahnke.

Finally respondent argues that the opinions of Dr. Brown and Karen Crist Terrill that claimant is capable of sedentary employment should be adopted. Dr. Brown concluded claimant could perform light category employment but he admitted his opinion was only based on medical evidence and that he never discussed the claimant’s educational level, job skills, special training or experience. Dr. Brown further admitted that such information would be helpful in rendering an opinion whether the claimant was employable. Lastly, Dr. Brown testified that he does not know if he took all seven surgeries into account when he rendered his opinion. Ms. Terrill based her opinion solely upon the restrictions imposed by Dr. Brown and never considered the other doctors’ reports.

Herein, the claimant was placed on retirement disability because the respondent could not accommodate his restrictions. The claimant applied for and received Social Security Disability. Drs. Trimble and Murati concluded that claimant cannot engage in substantial gainful employment. Jerry Hardin concluded that utilizing the reports of Drs. Trimble and Murati, the claimant is unable to engage in substantial, gainful employment. The claimant testified that his pain prevents him from working at substantial gainful employment.

In conclusion, based upon the totality of the evidence including the numerous surgeries, the findings of Drs. Trimble and Murati, the opinion of Mr. Hardin utilizing the doctors’ reports, the limited physical activities the claimant can perform, the claimant’s lack of education and training, his past history of physical labor jobs and his testimony that he is in constant pain, it is the Board’s determination that the claimant has met his burden of proof to establish that he is essentially and realistically unemployable. The Administrative Law Judge’s determination that claimant is permanently and totally disabled is affirmed in all respects.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated October 25, 2000, is affirmed.

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<sup>5</sup>Deposition of D. Troy Trimble, D.O., June 2, 2000; p. 31.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: David Farris, Attorney, Wichita, Kansas  
David Wooding, Attorney, Wichita, Kansas  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director